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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000746-ME

S.B. AND E.B. APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA JOHNSON, JUDGE
ACTION NOS. 16-J-504164-001 AND 16-J-504164-002

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH OF
KENTUCKY; M.C.M., A CHILD; AND C.W.M. APPELLEES

AND NO. 2019-CA-000866-ME

C.M., NATURAL FATHER APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA JOHNSON, JUDGE
ACTION NOS. 16-J-504164-001, 16-J-504164-002, AND 16-J-504164-003

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
M.M., A MINOR CHILD;
S.B., MATERNAL GRANDPARENT;
E.B., MATERNAL GRANDPARENT;
AND M.S., PATERNAL GREAT-GRANDMOTHER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

GOODWINE, JUDGE: S.B. and E.B. (collectively "Grandparents"), and C.M. (Father), separately appeal the Jefferson Family Court's April 30, 2019 order denying Grandparents' motion to be considered for placement of their grandchild, M.M.

Grandparents contend the family court erred by: (1) failing to place M.M. in their custody after an ICPC[1] approved home-study; (2) failing to comply with KRS[2] 620.090 and 922 KAR[3] 1:140; and (3) failing to apply the best interest standard. Similarly, Father believes the family court erred by failing to apply the

[1] Interstate Compact on the Placement of Children.

[2] Kentucky Revised Statutes.

[3] Kentucky Administrative Regulations.

best interest standard. This Court consolidated these appeals by order entered August 28, 2019. Finding no error, we affirm.

BACKGROUND

The Cabinet has been involved with this family since shortly after M.M.'s birth on November 25, 2016. The Cabinet's involvement resulted in three separate dependency, neglect, or abuse petitions being filed over the span of three years. However, the crux of this matter pertains only to the June 22, 2018 petition.[4]

In that petition, the Cabinet alleged great-grandmother and Father failed to properly supervise. At that time, M.M. suffered severe facial injuries sustained from the family dog, resulting in her hospitalization. The Cabinet also alleged domestic violence issues and substance abuse concerns. Ultimately, the family court granted the Cabinet emergency custody of M.M.

Once granted emergency custody, the Cabinet explored placement options. It considered multiple maternal relatives as options, including Grandparents. At the Cabinet's request, a home-study was conducted at Grandparents' residence in Florida. By July 17, 2018, the Cabinet had various

[4] The first petition resulted in M.M. being returned to her biological parents. However, shortly after M.M. was returned, the Cabinet filed another petition due to the mother passing away from an overdose and Father admitting to heroin use. The second petition resulted in permanent custody being awarded to M.M.'s paternal great-grandmother.

relative placement options to consider. In the interim, it placed M.M. with her maternal great-grandparents, but that arrangement proved to be inadequate because of their ill-health. At the time, reunification of M.M. with Father was the goal. Because of this, the Cabinet prioritized local relatives first, before using Grandparents as an option. Nevertheless, Father expressed a desire for M.M. to be placed with Grandparents.

The home-study on Grandparents' home was not completed and approved until January 3, 2019. However, the home-study, and the Cabinet, had some concerns with placing M.M. with Grandparents, specifically, S.B.'s (Grandfather's) criminal history,[5] the small size of Grandparents' home,[6] Grandfather's own parental custody issues involving his daughter when she was a child, and the lack of relationship between Grandparents and M.M. Ultimately, the Cabinet did not recommend placement with Grandparents.

On January 22, 2019, Grandparents intervened in the action, demanding placement of M.M. in their custody. The family court held a dispositional placement hearing on April 11, 2019, and at that time, denied Grandparents' custody request, against Father's wishes. This appeal followed.

[5] S.B.'s (Grandfather's) criminal history included convictions for aggravated assault with a deadly weapon, kidnapping with a deadly weapon, aggravated battery domestic violence, and driving under the influence.

[6] Grandparents had a small, two-bedroom home, where two adults and three children—ages two and one—were already living.

STANDARD OF REVIEW

The family court's findings are reviewed under the clearly erroneous standard. *C.R.G. v. Cabinet for Health & Family Services*, 297 S.W.3d 914, 916 (Ky. App. 2009). Such a standard does not require uncontradicted proof, but rather "proof of a probative and substantive nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *Id.* (citation omitted). Significantly,

> [r]egardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted).

If the family court's findings are supported by substantial evidence and, thus, not clearly erroneous, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). If the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the family court abused its discretion in applying the law to the facts. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005).

ANALYSIS

Essentially, Grandparents argue the family court erred by not placing M.M. with them for three reasons: (1) they were an ICPC approved home; (2) Kentucky law mandates M.M. to be placed with them; and (3) it is in M.M.'s best interest to be placed with them. Likewise, Father believes the family court erred because its decision was not supported by substantial evidence, so the ruling was not in M.M.'s best interest. We disagree on all accounts and address each of them individually.

First, Grandparents contend they were in an ICPC approved home. Kentucky law codified the ICPC through KRS 615.030. The ICPC's purpose is to ensure a child has the maximum opportunity to be placed in a suitable environment. KRS 615.030 Article I(a). Grandparents argue that an ICPC approved home is absolute grounds to house a child. However, being an approved household is far from an absolute. The ICPC merely gives the "sending agency's state" more viable options for placement. Nowhere in the statute does the ICPC mandate the family court, or the Cabinet, to send a child to an ICPC approved home. In fact, KRS 615.030 Article V(a) gives the "sending agency's state" jurisdiction over the child. It provides:

> The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had

> remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state.

KRS 615.030 Article V(a).

Since Kentucky retains jurisdiction to decide custody, supervision, care, and disposition of children, the Cabinet and the family court did not err by choosing not to house M.M. with her Grandparents. However, the family court still must apply relevant Kentucky law to its decision, as discussed below.

Next, Grandparents contend the family court failed to follow 922 KAR 1:140 and KRS 620.090 in making its decision. We disagree. Under KRS 620.090(2), ". . . the cabinet or its designee shall use the least restrictive appropriate placement available." *See also G.P. v. Cabinet for Health and Family Services*, 572 S.W.3d 484 (Ky. App. 2019). "While CHFS *must consider* relative placement over other options, it is *not required to choose* relative placement over other options." *Id.* at 492 (citing *P.W. v. Cabinet for Health and Family Services*, 417 S.W.3d 758, 761 (Ky. App. 2013) (citation omitted)).

Additionally, KRS 620.090(1) applies to the early stages of a dependency, neglect, or abuse action. Before Grandparents were even approved by an ICPC evaluation, the family court already ordered temporary custody to the Cabinet. Grandparents were not even a possible option at that point. Grandparents

appealed an order arising from the dispositional hearing, well after a temporary removal hearing.

Furthermore, KRS 620.090(2) only mandates the Cabinet use the least restrictive means possible in placing the child. Here, the Cabinet had multiple options for relative placement, and it investigated each option. Given the goal at the time placement was considered was reunification with Father, the Cabinet sought placement closer to home in an effort to help facilitate the relationship.

Additionally, the Cabinet did not believe Grandparents were an appropriate home for M.M. because of Grandfather's criminal history, inadequate space in the home, lack of a relationship between M.M. and Grandparents, and Grandfather's own parental issues. Nothing in the statute mandates or requires the Cabinet to place a child with a relative.

The Cabinet exercised reasonable efforts to prevent removal. Father was given a case plan to follow and relatives were considered. Sadly, no other option was realistic.

Finally, the only feasible argument Grandparents and Father make on appeal is that the family court erred in applying the best interest standard. Yet even this argument is futile. The best interest standard is paramount to family law jurisprudence. KRS 620.023 illustrates factors courts must consider, if relevant, in

a best interest determination in a dependency, neglect, or abuse action. Those factors are:

> (a) Mental illness as defined in KRS 202A.011 or an intellectual disability as defined in KRS 202B.010 of the parent, as attested to by a qualified mental health professional, which renders the parent unable to care for the immediate and ongoing needs of the child;
>
> (b) Acts of abuse or neglect as defined in KRS 600.020 toward any child;
>
> (c) Substance use disorder, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child;
>
> (d) A finding of domestic violence and abuse as defined in KRS 403.720, whether or not committed in the presence of the child;
>
> (e) Any other crime committed by a parent which results in the death or permanent physical or mental disability of a member of that parent's family or household; and
>
> (f) The existence of any guardianship or conservatorship of the parent pursuant to a determination of disability or partial disability as made under KRS 387.500 to 387.770 and 387.990.

KRS 620.023(1). Grandparents contend the family court erred in applying these factors. However, the list of factors in KRS 620.023 is not exhaustive, and the family court can consider a plethora of factors in making this crucial determination.

In the alternative, Father argues the family court should utilize the best interest standard found in KRS 403.270, but that statute is inapplicable to dependency, neglect, or abuse actions. KRS 403.270 is utilized in cases for *de facto* custodianship or custody matters. *See* KRS 403.270(2) ("The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian."). The interplay of KRS 403.270 and KRS 620.023 is not lost on this Court. For a court to grant permanent custody in a dependency, neglect, or abuse action, the court must apply the KRS 403.270 factors. *London v. Collins*, 242 S.W.3d 351, 356 (Ky. App. 2007); *see N.L. v. W.F.*, 368 S.W.3d 136, 148 (Ky. App. 2012) ("In order to grant permanent custody via a custody decree in a dependency action arising under KRS Chapter 620, the court must comply with the standards set out by the General Assembly in KRS 403.270(2)[.]"). But, this case does not fall under either category. In this case, the family court only denied an order for placement—no permanent custody determination was ever made, meaning KRS 403.270 is not relevant. Additionally, Grandparents do not qualify for *de facto* custodianship, and Father was not the party seeking custody. *See* KRS 403.270(1) ("'[D]e facto custodian' means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months

or more if the child is under three (3) years of age . . . ."). For those reasons, the best interest factors from KRS 403.270 cannot be utilized. The family court properly used the factors from KRS 620.023, meaning Father's wishes would not necessarily be considered under the statute.

The family court's five-page order contained ample substantial evidence justifying its decision to deny Grandparents' plea for placement, including the concerns the Cabinet expressed about Grandparents' home. Although Grandfather attempted to downplay his criminal record, he still testified he had never met M.M. And M.M.'s foster parents even testified the child has no memory of her Grandparents. When asked about relatives, she never once referenced Grandparents.

The family court noted that M.M. "has endured more tragedy than most adults." Record (R.) at 92. "Born with drugs in her system, she later lost her mother to drug addiction. She was then exposed to domestic violence, and horrifically injured by a dog while in her family's care. Moreover, she has changed placements four or five times. M.M. has experienced severe trauma." *Id.*

The family court found she is doing well with her foster family and getting the medical and emotional care she needs. *Id.* M.M. suffered from night terrors, but those are now abating. *Id.* Also, she can maintain contact with her

biological family and will continue to have contact with her biological family in the future. *Id.*

The child's best interest was a paramount consideration in the family court's decision. Given the child's age, traumatic past, and significant improvement in the foster home, it would not be in her best interest to be uprooted, again, to experiment with a relative placement with people with whom she has not bonded—or even knows. Furthermore, Grandfather's criminal history, domestic violence, and past parental concerns weigh heavily in favor of it not being in the child's best interest to live with him. *See* KRS 620.023(1)(b) and (d).

Father attempts to argue the family court did not take into consideration his opinion or evidence that weighed in favor of placement with Grandparents. However, that is irrelevant and not enough for us to overturn the family court's decision. The family court's decision is based on substantial evidence and we will not disturb those findings or conclusions even in the face of conflicting evidence. *Moore,* 110 S.W.3d at 354. The family court is in the best position to weigh the evidence. *Id.*

CONCLUSION

Based on the foregoing reasons, we affirm the Jefferson Family Court's April 30, 2019 order.

ALL CONCUR.

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[7] Counsel for Appellee M.S. filed a motion to withdraw. This Court granted said motion and gave M.S. sufficient time to file a *pro se* brief. She did not file a brief.